APPENDIX

APPENDIX A.

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1967 — APRIL SESSION, 1968

No. 16536
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JULIAN PEREZ,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

July 31, 1968

Before CASTLE, *Chief Judge,* HASTINGS, *Circuit Judge,* and KNOCH, *Senior Circuit Judge.*

KNOCH, *Senior Circuit Judge.* Julian Perez, defendant-appellant, and two co-defendants were indicted on a charge of bank robbery in violation of Title 18 U.S.C. §2113(d) in that on November 20, 1961 by force and violence they took a sum in excess of $69,000 belonging to a bank whose deposits were insured by the Federal Deposit Insurance Corporation, in the course of which they assaulted two persons whose lives they put in jeopardy by use of a pistol. The indictment was returned June 23, 1965; an information was filed in April 1965.

In December 1965 one co-defendant, Jesse Paramo, pleaded guilty. Shortly thereafter the second co-defendant, Manuel Zurita was tried and found guilty.

The defendant-appellant was serving a sentence in the Arkansas State Penitentiary when the information was filed. In June 1965 a federal warrant was served on him there. On his release from the Arkansas State Penitentiary on March 10, 1967 he was taken in custody and returned to the Northern District of Indiana to answer this charge. After a jury trial he was found guilty and sentenced to serve twenty years.

The sole error charged is denial of defendant's motion to dismiss based on alleged denial of a speedy trial by failure of the government to take affirmative action to bring him to trial earlier.

The sufficiency of the evidence to sustain a conviction is not questioned. There was evidence that the three defendants obtained entry to the home of the bank manager on a pretense of being deputy sheriffs, that they held him and his wife captive all night, that in the morning appellant and Zurita forced the bank manager to open the vault and night depository and left him in the bank bound to a pipe. The third co-defendant Paramo testified that he remained in the bank manager's home for about fifteen minutes with the wife and then left.

Appellant contends that he was prejudiced by the delay in trial. He did not testify. Evidence was offered to show he was at work on the day of the robbery November 20, 1961, a Monday. His wife testified that he was at home the night of November 19, 1961, a Sunday night, because he had never stayed away all night at any time since they were married. She said he always worked on

Mondays because Tuesday was his day off during the week in 1961.

Appellant argues that he was deprived of the helpful testimony of witnesses who at the time of the trial were no longer available (none such are mentioned, however) or whose recollection had become obscure.

Two fellow employees testified that they thought that Tuesday was the appellant's day off in 1961 but neither could remember positively because of the lapse of time. A work record showed that appellant worked forty hours during a period which included Monday, November 20, 1961, but it did not indicate which days he worked.

It is mere conjecture that these witnesses would have had clearer recollections in December 1965 and would have given more compelling testimony. On rebuttal F.B.I. Agent Rene J. Dumaine testified to a contemporary record of a statement by one of those witnesses, Albert Specht, the cashier where appellant worked, who on October 21, 1963, said that Monday was the appellant's regular day off. At the trial Mr. Specht did not recall making that statement. A partner in the concern, Mitchell Obuchowski on a later occasion had first told Agent Dumaine that appellant's day off was Tuesday, and then had come back after a conversation with Edward Rzeznick, another employee (who testified at the trial) and told Agent Dumaine that it was Monday. We find no indication of any substantial prejudice resulting from the delay, as claimed.

Appellant complains that he was deprived of his eligibility for parole in Arkansas because of the federal detainer placed against him. As noted in the colloquy at the time of passing sentence, there is no assurance

or even indication from the record that appellant would have been paroled in the minimum time had the hold order not been on file.

Appellant contends further that he was deprived of the possible benefit of having the Trial Judge order the federal sentence to run concurrently with the Arkansas sentence. However the Trial Judge in this case commented on this point in passing sentence and clearly stated that he was taking this factor into consideration and was giving appellant full credit for the time served in Arkansas.

Both parties cite *Simmons* v. *United States*, 2 Cir., 1964, 338 F. 2d 804, where the Court (at page 807) set out four relevant factors for consideration of a claim that speedy trial under the Sixth Amendment was denied: (1) length of delay, (2) reason for delay, (3) prejudice to defendant, and (4) waiver, if any.

In June 1964, co-defendant Paramo, while hospitalized for a period of about a year in a tuberculosis hospital, made a confession implicating the other two co-defendants, and was arrested on release from that hospital in April 1965.

It is apparent from the testimony of the bank manager and from that of Special Agent Dumaine that the federal agents and the local police were engaged, continuously from the date of the crime, in efforts to identify the offenders. The confession of Paramo was a turning point in the investigation but did not in itself terminate that investigation.

The District Court spoke of his own recollections of the Zurita trial and said that the delay could not be charged to the government because of lack of "sufficient identity and evidence" to warrant earlier indictment.

Appellant contends that the State of Arkansas could not have refused to deliver him on a writ of habeas corpus ad prosequendem obtained in a federal court. Assistant United States Attorney Richard F. James in his affidavit described two telephone conversations early in November 1965 with the Warden of the Arkansas Penitentiary (in his efforts to secure appellant's presence for trial in the District Court in December 1965) in which the Warden specifically stated that the Arkansas authorities would not comply with such a writ.

The Arkansas statutes quoted by appellant, reading in part:

> A person committed to prison in custody of an officer, for any criminal offense, shall not be removed from said prison or delivered to the custody of any other officer, except in the following cases: By writ of habeas corpus, or some other legal writ: When he *may be* delivered to an officer, to be removed to some common jail. . . . . Arkansas Statutes 43-2607
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> * * * *
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> If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor *at his discretion* either may surrender him on demand of the executive authority of another State or may hold him until he has been tried and discharged, or convicted and punished in this State. Arkansas Statutes 43-3019 [emphasis added]

all show language which is permissive in nature and not obligatory.

In *Strand* v. *Schmittroth*, 9 Cir., 1957, 251 F. 2d 590, *cert. dism.* 355 U.S. 886, the Court said (at page 599):

> Where the body of the accused is in manual possession of one sovereign, surrender can be obtained by another such sovereign only by consent of the first or by force. The latter is unthinkable.

In *United States ex rel. Moses* v. *Kipp,* 7 Cir., 1956, 232 F. 2d 147, 150, Judge Duffy speaking for this Court, said:

> The United States District Court for the Northern District of Illinois could not have compelled the State of Michigan to surrender Moses after he had been incarcerated in that state for violation of a Michigan law. In spite of the terminology of the writ, the consent of Michigan authorities was necessary to obtain the custody of Moses.

The Court in *Strand* v. *Schmittroth, supra,* (at page 610) quoted with approval the opinion in *Vanover* v. *Cox,* 8 Cir., 1943, 136 F. 2d 442, 443-444, cert. den. 320 U.S. 779:

> A person who has violated the criminal statutes of both the federal and a state government may not complain of the order in which he is tried or punished for such offenses. The interested sovereigns may arrange the order of trial and punishment according to their convenience.

See also *Stamphill* v. *Johnston,* 9 Cir., 1943, 136 F. 2d 291, 292, cert. den. 320 U.S. 766.

Although the appellant asserts that the sole information given him by the Federal Bureau of Investigation agents while he was in the Arkansas Penitentiary related to his right to plead guilty and be sentenced by the Court in Little Rock, Arkansas, he was fully aware that he had been indicted. Appellant argues that he should not be considered to have waived his right to a speedy trial. He urges that the harsh rule of *United States* v. *Lustman,* 2 Cir., 1957, 258 F. 2d 475, 478, cert. den. 358 U.S. 880 (that no valid claim of denial of the right to a speedy trial may be asserted unless the defendant has made a demand for trial) ought to be ameliorated. He refers to the trend toward requiring available advice of counsel in more and more instances and the disfavor in which Courts hold long delays

in bringing incarcerated prisoners to trial. We have considered all the cases and authorities cited by counsel, but conclude that the circumstances of the case before us do not justify abandonment of the established rule. We share the view of the Court in *United States* v. *Maxwell,* 2 Cir., 1967, 383 F. 2d 437, 441, cert. den. 389 U.S. 1043 and 1057, which stated:

> Aware that their claims are barred under *Lustman,* appellants invite us to abandon the so-called demand rule which we have consistently applied in a constantly lengthening line of cases. [citing cases] We decline the invitation, however, because the reasoning of *Lustman,* that the demand rule is consonant with the bulk of federal authority and preserves the speedy trial right as a shield for the defendant's protection but not as a sword for his escape, is still to us persuasive.

The judgment of the District Court is affirmed.

Affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

ARKANSAS STATUTES

Removal of a Person in Confinement

"A person committed to prison in custody of an officer, for any criminal offense, shall not be removed from said prison or delivered to the custody of any other officer, except in the following cases: By writ of habeas corpus, or some other legal writ: When he may be delivered to an officer, to be removed to some common jail . . . When the person is charged, by affidavit, with treason or felony, committed in some other State or Territory of the United States of America, in which case he shall, on the demand of the executive of such State, or the Governor of a Territory in the United States, from which he fled, be sent thither in custody, by order of any circuit court or judge thereof, or may be bound by recognizance, with good security, by said court or judge, to appear at the proper time and place, and surrender himself to the court or tribunal having jurisdiction of the offense, if the said court or judge shall, upon consideration of the evidence, be of the opinion he should be put upon his trial." Arkansas Statutes 43-2607

Uniform Extradition Act

"If a criminal prosecution has been instituted against such person under the laws of this State and is still pending, the Governor at his discretion either may surrender him on the demand of the executive authority of another State or may hold him until he has been tried and discharged, or convicted and punished in this State." Arkansas Statutes 43-3019

"Subject to the qualifications of this act, and the provisions of the constitution of the United States controlling, the acts of Congress in pursuance thereof,

it is the duty of the Governor of this state to have arrested and delivered unto the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state." Arkansas Statutes 43-3002

"No demand for the extradition of a person charged with a crime in another State shall be recognized by the Governor unless in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the State having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon. The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy must be authenticated by the Executive Authority making the demand, which shall be prima facie evidence of its truth." Arkansas Statutes 43-3003

28 U.S.C. SECTION 2241, POWER TO GRANT WRIT

"(a) Writs of habeas corpus may be granted by . . . the district courts within their respective jurisdictions . . .

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or . . .

(5) It is necessary to bring him into court to testify or for trial . . ."

APPENDIX C.

MOTION TO DISMISS

Comes now the defendant Julian Perez and moves the Court to dismiss the indictment and as grounds for dismissal alleges and says:

1. Defendant with two others was charged by way of indictment on June 23, 1965, with violation of Title 18, U. S. C., Section 2113 (d).

2. At the time defendant was indicted he was confined in the Arkansas State Penitentiary at Grady, Arkansas, having been in custody in said penitentiary since October 6, 1963.

3. Defendant was in custody in said state penitentiary by virtue of a conviction of robbery in the Garland County Circuit Court, Hot Springs, Arkansas, in May of 1963; defendant was sentenced to a term of six years imprisonment and was confined in said penitentiary until March 10, 1967, at which time he was released to the custody of a United States Marshal and by him delivered to the Lake County Jail to answer this charge; defendant has been admitted to bail since on or about March 4, 1967.

4. That while defendant was incarcerated in the Arkansas State Penitentiary he was served with a warrant of arrest on the indictment in the case at bar; that he was served with said indictment on or about the 30th day of June, 1965.

5. After having been served with said indictment the Government made no attempt to obtain a writ of habeas corpus ad prosequendum to have said defendant answer the charge and stand trial in the Northern District of Indiana.

6. That by virtue of the delay in trial defendant has been prejudiced in the following respects:

a. He was not eligible for early parole due to the detainer that the federal authorities had placed upon him with the authorities of the State of Arkansas.

b. In the event defendant would be convicted of the charge he will have been deprived of the benefit of having any sentence imposed by this Court run concurrently with the sentence he was serving in the Arkansas State Penitentiary.

c. Witnesses upon whom the defendant is relying and intends to rely in the trial of this cause are now unavailable or their recollection has become obscure in regard to the events to which they would be called upon to testify.

d. Defendant has been denied his constitutional right to a speedy trial.

7. At the time defendant was served with said warrant of arrest he was not represented by counsel, did not have the advice of counsel and was not advised of any of his rights so that he could make an intelligent decision as to whether or not to insist upon immediate trial or to resist extradition. Defendant is a lay person of limited education with no legal background or knowledge and was not aware of any of the consequences of his actions when he was served with said warrant of arrest.

Wherefore, defendant prays that the Court dismiss the indictment and that he be discharged.

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Max Cohen
Attorney for Defendant,
Julian Perez

APPENDIX D.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

The defendant, Julian Perez, has moved the Court to dismiss the pending indictment in the above-captioned matter on the ground that he has been denied a speedy trial in violation of the 6th and 14th Amendments to the Constitution of the United States. Numerous authorities are cited in the memorandum brief, filed in support of that motion.

The government concedes that, had there been a lengthy and unnecessary delay in the bringing to trial of the defendant, the motion now before this Court would have had merit. However, in the case at hand, although the crime for which Perez is under indictment is alleged to have occurred in November, 1961, an indictment was not returned against either him or the two co-defendants until June, 1965. One co-defendant entered a plea of guilty and another was tried and convicted in this Court on December 14, 1965. Prior to that trial the government attempted to secure the presence of the defendant Perez in Hammond so that he could be tried jointly with the defendant Manuel Zurita, but was unsuccessful due to the lack of cooperation on the part of the Arkansas authorities. The attempts by the government and the negative results are more specifically set forth in the affidavit of Richard F. James, which affidavit is attached hereto and made a part of this memorandum.

The delay in the prosecution of this matter has not, by the standards set forth in the cases cited in the brief in support of defendant's motion, been unusually long or

unreasonable, in view of the fact that the defendant was not available for trial because of incarceration in the State of Arkansas. As pointed out by the defendant, the right of a speedy trial is necessarily relative. In the present case, the defendant Perez could not be tried until he was released from custody in Arkansas. This release was not effected until February, 1967. Failure to bring Perez to trial during that period could not be avoided.

In the instant case, the defendant Perez had been interviewed and advised of the indictment against him by Agents of the Federal Bureau of Investigation during the period of his incarceration in Arkansas. A detainer had been filed against him and the record is without entry of any evidence that he requested or demanded an immediate trial.

Respectfully submitted,
Richard F. James
Richard F. James
Ass't. United States Attorney

State of Indiana,
County of Lake—ss:

AFFIDAVIT

Richard F. James, being first duly sworn upon oath, deposes and says the following:

1. That he is employed by the United States Department of Justice as an Assistant United States Attorney for the Northern District of Indiana, assigned to the Hammond, Indiana Division, and that he has held that position continuously since January 4, 1965.

2. That on December 14, 1965, he was the prosecutor for the United States in the prosecution of Manuel Zurita for violation of Section 2113(d) of Title 18 of the United States Code.

3. That the said defendant, Manuel Zurita, had been indicted on this charge by a Federal Grand Jury in June, 1965, along with one Jesse Paramo and Julian Perez, and that affiant was aware that the said Julian Perez was named in the indictment as a co-defendant, and also that Perez was at that time serving a sentence in the Arkansas State Penitentiary for armed robbery.

4. That in early November, 1965, affiant talked telephonically on two separate occasions to Captain A. D. Nisler, Head Warden, Arkansas State Penitentiary, Grady, Arkansas, regarding the possibility of Perez being made available by the Arkansas authorities to stand trial, along with Manuel Zurita, in the U. S. District Court, Hammond, Indiana.

5. That on both of those occasions, affiant was advised by Captain Nisler that Perez would not be made available to government authorities for trial in December, 1965, and that the Arkansas authorities would not comply with a Writ of Habeas Corpus ad Prosequendum if such a writ were to be issued by the Federal Court in Hammond.

6. That affiant was further notified by Captain Nisler that Perez would not be available to federal authorities prior to release from the Arkansas State Penitentiary, and that the earliest release date for the prisoner would be December 30, 1966.

7. Affiant thereafter made no further attempt to secure the presence of Perez in Hammond, Indiana for trial.

Richard F. James
Richard F. James
Ass't. United States Attorney

Subscribed and sworn to before me this 14th day of July, 1967.

Dorothy Carpenter
Deputy Clerk, U. S. District
Court, Northern District of Indiana

APPENDIX E.

TESTIMONY ON MOTION TO DISMISS

JULIAN PEREZ, being first duly sworn to testify the truth and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. Cohen.

Q. Would you state your name, please?

A. Julian Perez.

Q. And you are the same Julian Perez who is the defendant in this cause, are you not?

A. Yes, I am.

Q. Mr. Perez, inviting your attention to the year 1965, and particularly the month of June of 1965, where were you at that time?

A. Arkansas State Penitentiary.

Q. And how long had you been there?

A. I had been there about two years. I was admitted October the 5th or the 6th. It was early October of '63.

Q. Of '63 you were committed?

A. Yes.

Q. And why were you there?

A. Armed robbery committed in Garland County, Hot Springs, Arkansas.

Q. And what was your term of imprisonment?

A. Six years.

Q. Now, in June of '65, were you served or advised---strike that.

In June of '65, were you advised that a warrant had been issued out of this court for your arrest?

A. Yes, in June of '65, I was. I was called to the captain's office which—he is the superintendent, and he told me that he had gotten a call from Hammond, Indiana, and that I was charged with bank robbery, and they had asked him if they—if he would release me to come over here. That was the phone call, and that he told them that, no, that he didn't make it a practice of sending his boys out of State. There were his exact words.

Q. And what was the name of this warden?

A. Captain Dan Stevens.

Q. Now, at the time he advised you that that warrant had been issued for your arrest, did he tell you that you had a right to demand a speedy trial?

A. No, he didn't.

Q. Did anyone advise you that you had a right to demand a speedy trial on this charge you are now facing?

A. No, no one did.

Q. Were you aware that you had a right to demand a speedy trial?

A. No.

Q. Have you had any education or training in law?

A. No, I haven't.

Q. At the time you were confined in the Arkansas State Penitentiary and at the time that that warrant was read to you, were you ever advised of a right to counsel?

A. No, I wasn't.

Q. Did you ever have an opportunity to obtain counsel at the time this warrant was read to you?

A. No.

Q. Did you have an opportunity to obtain counsel after the warrant was read to you?

A. No. As a matter of fact, when they did come in with that warrant, I was in Captain Nisler's office, and I didn't know really what they were talking about, you

know, more or less; and other than the warrant—then, I asked him, I says—he wanted me to plead guilty to it, and I says, "No," I says, "I don't want to discuss this matter unless I have a lawyer of my own choosing," and he didn't respond either way.

Q. Now, if you had been aware that you had a right to demand immediate trial, would you have demanded it?

A. Yes.

Q. For what reason?

A. Because when you are there, well, in that institution anyway, if you have a hold, any hold—they call that a hold, you can't make parole. In other words, you have to flatten your sentence, what they call day per day, and you can't make no parole; and like I had been there about two years already, and I was—I knew that if I could make parole some kind of way, that I might have been able to make it, but with that hold, I wasn't able to. I mean, that was just common knowledge.

Q. And as a result of that detainer being placed upon you, were you required to serve the maximum sentence, the six-year term that was imposed on you?

A. Yes, I was.

Q. How much time did you actually serve?

A. A little over three and a half years.

Q. And the only time off you got was your good time allowance?

A. Yes.

Mr. Cohen: No further questions.

Cross Examination by Mr. James.

Q. Did you at any time request the right to have a trial?

A. I don't believe I did.

Q. Did you ever tell the warden or anyone else in authority in Arkansas that you wished to have a trial immediately?

A. No, I didn't; but I requested a lawyer because I didn't understand what that—all that writing was about, and they were talking to me, and that is when I—I asked if I would have a lawyer of my own choosing; that then I would discuss the matter with them further.

Well, I guess he just refused me, you know. He just smirked and looked away.

Q. Who is this?

A. Captain Nisler.

Q. And he is the warden, is that correct?

A. No, he is not the head—he is the Assistant Superintendent, is what his job is, but he is not the head man there. Captain Dan Stevens is the superintendent.

Q. Were you approached during the period of your imprisonment by agents of the FBI to discuss this matter?

A. They were there numerous times, but all the time they—all they wanted was me to make a confession, and they says, "If you make a confession—", one time I remember, they says, "If you make a confession here, then we will transfer the trial to Little Rock, and then that is —we would—then we will bring you to trial, but we will bring you to trial if you plead guilty now and sign this paper pleading guilty to the charge, and we will bring the trial to Little Rock, and then we will give you time here in Arkansas. We could run it together."

Q. They did discuss with you the charge, though, is that right?

A. Yes. Well, it was bank robbery.

Mr. James: No further questions.

Redirect Examination by Mr. Cohen.

Q. When the FBI agent talked to you about signing a confession, did they say—did they mention to you that you could follow what they called a Rule 20 proceeding, that you could plead guilty in that district?

A. Yes, they says I could plead guilty in that district, but—and that that is the only way that they would consider me bringing me to trial was if I plead guilty and bring me to Little Rock, which is the State Capital there.

Mr. Cohen: No further questions.

Mr. James: Nothing further.

Mr. Cohen: You may step down.

(Witness excused.)

Mr. Cohen: Defendant rests on the motion, your Honor.

The Witness: Thank you, your Honor.

Mr. Cohen: Does your Honor wish to hear any argument?

The Court: No, I think I know what the law is. (R. 3, l. 1—R. 9, l. 17). . . .

APPENDIX F.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE

Standards Relating to

SPEEDY TRIAL

Recommended by the

ADVISORY COMMITTEE ON THE CRIMINAL TRIAL

Walter V. Schaefer, Chairman

(Reported in The Criminal Law Reporter, BNA, 1 Criminal Law 3136, July 5, 1967)

PART III. SPECIAL PROCEDURES: PERSON SERVING TERM OF IMPRISONMENT

3.1 Prosecutor's obligations; notice to and availability of prisoner.

To protect the right to speedy trial of a person serving a term of imprisonment either within or without the jurisdiction, it should be provided by rule or statute and, where necessary, interstate compact, that:

(a) If the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, he must promptly:

(i) undertake to obtain the presence of the prisoner for trial; or

(ii) cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(b) If an official having custody of such a prisoner receives a detainer, he must promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs such official that he does demand trial, the official shall cause a certificate to that effect to be sent promptly to the prosecuting attorney who caused the detainer to be filed.

(c) Upon receipt of such certificate, the prosecuting attorney must promptly seek to obtain the presence of the prisoner for trial.

(d) When the official having custody of the prisoner receives from the prosecuting attorney a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that prosecuting attorney (subject, in cases of interjurisdictional transfer, to the traditional right of the executive to refuse transfer and the right of the prisoner to contest the legality of his delivery).

3.2 Computation of time

The time for trial of a prisoner whose presence for trial has been obtained while he is serving a term of imprisonment should commence running from the time his presence for trial has been obtained, subject to all the excluded periods listed in section 2.3. If the prosecuting attorney has unreasonably delayed (i) causing a detainer to be filed with the custodial official, or (ii) seeking to obtain the prisoner's presence for trial in lieu of filing a detainer or upon receipt of a certificate of demand, such periods of unreasonable delay should also be counted in ascertaining whether the time for trial has run.

PART IV. CONSEQUENCES OF DENIAL OF SPEEDY TRIAL

4.1 Absolute discharge.

If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense. Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial.

4.2 Release on recognizance.

If a shorter time limitation is applicable to defendants held in custody, the running of this time should only require release of such a defendant on his own recognizance.